

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Patent Application of:	) ) Confirmation No.: 6984
Frank Richard Cichocki, Jr.	) Group Art Unit: 3731
Serial No. 10/727,367	) Examiner: Lang, Amy T.
Filed: December 4, 2003	)
For ACTIVE SUTURE FOR THE	)
: DELIVERY OF THERAPEUTIC	)
FLUIDS	

United States Patent and Trademark Office  
401 Dulany Street  
Alexandria, VA 22314

REPLY BRIEF

Appellants hereby reply to points made in the Examiner's Answer ("Answer") mailed April 23, 2009. Appellants respectfully request that the Board of Patent Appeals and Interferences ("Board") consider the following arguments with respect to the points made in the Answer.

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## II. TABLE OF AUTHORITIES

### Cases

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<u>SRI Int'l v. Matsushita Elec. Corp. of Am.</u>	9

### III. STATEMENT OF TIMELINESS

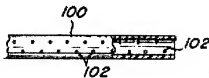
The Answer was entered on April 23, 2009. The present Reply Brief is being timely filed on June 23, 2009, within two months from the entry of the Answer.

### IV. STATEMENT OF FACTS

(1) In the Answer, at pages 6, 7, and 8, the examiner introduces drawings that are not disclosed by Burton (USP 4,159,720).

(2) The drawing at pages 6, 7, and 8 of the Answer are not supported by FIG. 14 of Burton.

(3) Burton FIG. 14, and col. 4, lines 46-49, as shown below, only disclose an alternative embodiment of the “wick” 48 of Burton, wherein the wick “may have the form of a hollow monofilament 100” with “lateral perforations 102 through which the fluid will pass into the tissue.”



*Fig. 14*

As shown in FIG. 14 the wick may have the form of a hollow monofilament 100 of fore example nylon, provided with lateral perforations 102 through which the fluid will pass into the tissue. As shown in FIG. 15 the wick may also have the form of a solid filament 104 having spiral grooves 106 in its external surface. As shown in FIG. 16 the filament 104 may have longitudinal groove 108.

(4) The “wick” 48 of Burton, when in the “form of a hollow monofilament 100” of FIG. 14, with “lateral perforations 102 through which the fluid will pass into the tissue” is not a braided suture.

(5) Burton FIG. 14, col. 4, lines 46-49, does not disclose “a hollow inner passageway coaxial with a braided suture.”

(6) Davis et al. (USP 3,474,703) does not provide any disclosure regarding the ratios of diameters of the outer braid 2 and the inner braid 3.

(7) Appellants’ specification at pages 21, lines 10 to page 22, line 2 shows that the ratio claimed in claim 2 was obtained through experimentation.

## V. ARGUMENT

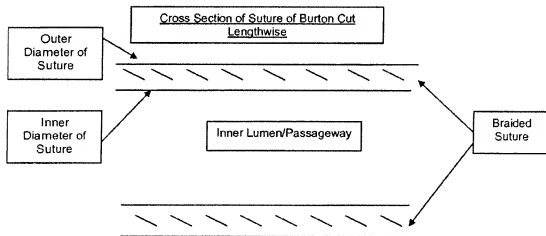
In the “Response to Argument” section (section (10) of the Answer, starting midway on page 5), several newly presented points were raised and are now addressed.

Generally, the examiner raises new issues with respect to the teachings of Burton, wherein the examiner at pages 5-8 of the Answer improperly asserts that the braided sutures of Burton by themselves have an inner passageway,

citing to FIG. 14 of Burton, and which is not the case. Specifically, FIG. 14 is an alternative embodiment that uses a perforated tube **instead** of a braided suture and not in addition thereto.

In addition, the examiner at pages 5-10 of the Answer for the first time improperly asserts that the claimed ratio recited in claim 2 is not commensurate with the experimental evidence provided for the claimed ratio. However, no *prima facie* case has been made with respect to the claimed feature, and the examiner has failed to consider that Appellants are entitled to claim more broadly than the representative examples of the experimental evidence.

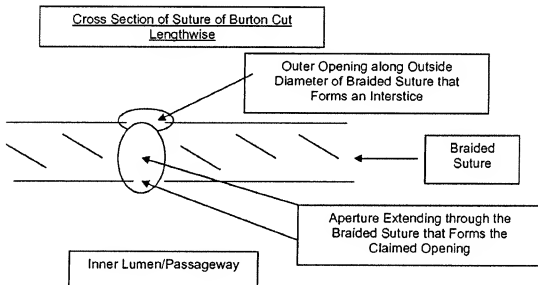
For example, on page 6 of the Answer, for the first time the examiner presents a drawing, shown below, allegedly corresponding to FIG. 14 of Burton and showing an “Inner Lumen/Passageway” within a “Braided Suture.”

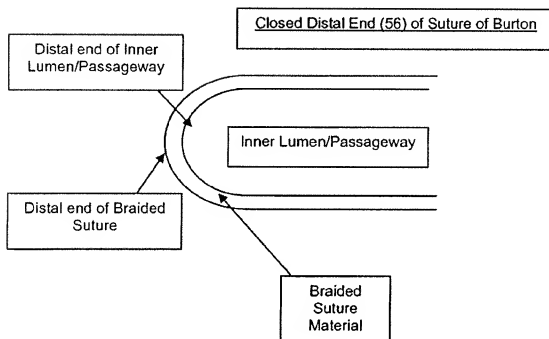


However, Burton FIG. 14, and as described at col. 4, lines 46-49, merely disclose an alternative embodiment of the “wick” 48 of Burton, wherein the

wick “may have the form of a hollow monofilament 100” with “lateral perforations 102 through which the fluid will pass into the tissue.” Therefore, contrary to the assertion by the examiner, the “wick” 48 of Burton, when in the form of a hollow monofilament 100 of FIG. 14 is not a braided suture.

Similarly, the examiner’s drawings on pages 6-7, shown below, are also deficient, where they try to improperly show the monofilament 100 of FIG. 14 as further comprising a “Braided Suture.”





Accordingly, Burton does not disclose, teach or suggest a braided suture and at least one passageway coaxial with at least a portion of the braided suture, as required by claim 1, nor the at least one passageway being a lumen of a tube, as required by claim 4. Similarly, Burton does not disclose, teach or suggest a braided suture and a tube coaxial with at least a portion of the braided suture, as required by claim 2.

With respect to the examiner's assertion at pages 5-10 of the Answer that the claimed ratio recited in claim 2 is not commensurate with the experimental evidence provided for the claimed ratio, Appellants note that Davis et al. does not provide **any** disclosure regarding the ratios of diameters of the outer braid 2



and the inner braid 3. Accordingly, the examiner has failed to even make a *prima facie* case with respect to this feature.

Moreover, Appellants are entitled to claim more broadly than the representative examples of the experimental evidence (See Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 906 (Fed. Cir. 2003); ACTV, Inc. v. Walt Disney Co., 346 F.3d 1082, 1091 (Fed. Cir. 2003); Apex Inc. v. Raritan Computer, Inc., 325 F.3d 1364, 1377 (Fed. Cir. 2003); Altiris, Inc. v. Symantec Corp., 318 F.3d 1363, 1373 (Fed. Cir. 2003); Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1327 (Fed. Cir. 2002); SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1121 n. 14 (Fed. Cir. 1985, (en banc))). If this were not the case, Appellants would be unjustly required to claim only the representative example disclosed by the experimental evidence, and which is not consistent with the case law.

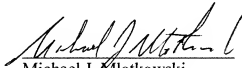
With respect to other points made by the examiner in the Answer, Appellants' generally disagree with the examiner's assertions, and rely on the arguments made in Appellants' Appeal Brief with respect to same.

Conclusion

On the basis of the foregoing, all of the Examiner's rejections should be reversed and such action is hereby requested.

A request for oral hearing is filed herewith and the corresponding fee set forth in 37 C.F.R. § 41. 20(b)(3) is authorized to be charged to the Deposit Account No. 50-2478 (14619) of the undersigned's firm in a separate paper that accompanies this Brief. However, should that paper be missing, this paragraph should be construed as containing such an authorization.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Mlotkowski", is written over a horizontal line.

Michael J. Mlotkowski  
Attorney for Appellants  
Registration No. 33,020  
(703) 584-3275

Customer No. 25570  
Roberts Mlotkowski Safran & Cole, P.C.  
P.O. Box 10064  
McLean, VA 22102  
Phone: (703) 584-3270  
Fax: (703) 848-2981

VI. SUPPLEMENTAL APPENDIX

Not applicable.